STANLEY P. McCORMICK

IBLA 76-107 Decided January 16, 1976

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA 7461.

Affirmed.

1. Alaska: Native Allotments

An allotment right is personal to one who has fully complied with the law and regulations. Substantially continuous use and occupancy by the Native himself, as an independent citizen or head of a family, is required, and such use must be at least potentially exclusive of others. A minor may initiate such use and occupancy, but use and occupancy by a dependent accompanied by his parents does not qualify. An applicant may not tack on use and occupancy of the land by his ancestors.

2. Alaska: Native Allotments

To be entitled to an Alaska Native allotment there must be 5 years of substantially continuous use and occupancy, whether or not the land is part of the national forest system or part of the unreserved public domain.

3. Alaska: Native Allotments--Withdrawals and Reservations: Effect of

Secretarial Guideline of October 18, 1973, established that an applicant for an Alaska Native allotment must have completed a 5-year period of substantially continuous

use and occupancy prior to withdrawal of the land. This guideline is not subject to the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1970).

4. Alaska: Native Allotments--Rules of Practice: Evidence--Rules of Practice: Hearings

A request for an evidentiary hearing will be denied where there is no dispute involving a material fact, and there is no chance of development of further material facts which would require a different decision.

APPEARANCES: Matthew D. Jamin, Esq., of Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On May 30, 1975, the Alaska State Office, Bureau of Land Management, rejected application AA 7461, filed pursuant to the Alaska Native Allotment Act, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (subsequently repealed by 43 U.S.C. § 1617 (Supp. III, 1973), subject to pending applications), because applicant failed to establish 5 years of independent control and use of the land prior to withdrawal under Public Land Order 1634, May 10, 1958.

The record on appeal reveals that appellant claims seasonal use and occupancy of lands located within protracted section 25, T. 30 S., R. 30 W., Seward Meridian, from June of 1957 to the present. Appellant was born December 12, 1953, being 4 years old when his alleged use and occupancy of the lands commenced, and 5 years old when the tract was segregated under the Public Land Order. The Bureau notified applicant by letter that he had not completed 5 years of substantial use and occupancy before the May 10, 1958, withdrawal, pointing out that "the substantial use and occupancy contemplated by the Native [A]llotment [A]ct must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents." Applicant was then given 60 days to correct any error in the application. Receiving no response, the Bureau issued the decision of May 30, 1975.

Appellant submits, along with his brief, an affidavit of his mother, Mary Anne Rynone, which establishes that his parents moved to Larsens Bay (appellant's residence) in 1952, living there until 1969. Affiant claims that beginning in 1952, her husband used the subject tract for hunting rabbits and ducks and for digging clams.

Specifically, she states that "Stan went out at times as a child with his dad when he was very young." Based on this, appellant argues:

> (a) there is no requirement that appellant demonstrate his status as an independent citizen or as head of a family to establish preference rights under the Native Allotment Act,
>
> (b) that it is permissible to tack ancestral use of a parent to acquire rights under the Act, and
>
> (c) that there is no requirement appellant demonstrate five years use and occupancy prior to the withdrawal in 1958.

Further, appellant specifically demands a hearing to show his ancestral use and possession, to demonstrate his own use, and to demonstrate generally that the BLM's rejection was erroneous.

All these arguments are without merit.

[1] We recognize that an applicant does not have to be 21 or the head of a family at the commencement of occupancy and use. "However, he must be old enough to exert independent use and control of the land and must be occupying the land to the potential exclusion of all others. The criterion of 21 years or head of a family must be satisfied when the application is granted. Natalie Wassilliey, 17 IBLA 348 (1974)." James S. Picnalook, Sr., 22 IBLA 191, 193 (1975). We cannot accept that a child of 4 could have exerted the necessary independent use and control of the land to the potential exclusion of others. Louise Luke, 22 IBLA 388 (1975); James S. Picnalook, Sr., supra; Susie Ondola, 17 IBLA 359 (1974); Helen F. Smith, 15 IBLA 301 (1974); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974).

Furthermore,

> * * * [t]his Board has repeatedly and consistently held that the substantial use and occupancy, as contemplated by the Native Allotment Act, must be by the Native independently for himself or as the head of a family, and not as a minor child occupying or using the land in company with his parents or ancestors. Therefore, appellant may not tack on the alleged ancestral use occurring prior to the commencement of his occupancy * * *. Emma Moses, 21 IBLA 264 (1975); Lula J. Young, 21 IBLA 207 (1975); Warner Bergman, 21 IBLA 173 (1975); Ann McNoise,

> 20 IBLA 169 (1975); Louis P. Simpson, 20 IBLA 387 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); Larry W. Dirks, Sr., 14 IBLA 401 (1974).

Herman Haakanson, 23 IBLA 54, 56 (1975) (emphasis added).

Appellant admits in the brief submitted on appeal, by evidence in the attached affidavit, that as a child he was in the company of his father while using the land. He cannot tack on his father's use to establish his own right under the Act.

[2] Appellant argues that the 5-year use and occupancy requirement is contrary to the language of the Native Allotment Act and applies only in cases concerning national forest lands.

The Native Allotment Act, 43 U.S.C. § 270-1 (1970), authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to issue allotments. The Act originally did not require 5 years use and occupancy, but by administrative regulation the 5-year period has been the rule since 1935 and is now set forth at 43 CFR 2561.2. Elsie Bergman, 22 IBLA 233 (1975); Warner Bergman, 21 IBLA 173 (1975). Moreover, a 1956 amendment of the statute requires 5 years of substantially continuous use and occupancy. 43 U.S.C. § 270-1 to 270-3 (1970).

> * * * [W]e do not agree that the legislative history of the 1956 amendments to the Alaska Native Allotment Act, codified as 43 U.S.C. §§ 270-2 to 270-3 (1970), conclusively shows an intent on the part of Congress to limit the 5-year requirement to Natives applying for land within a national forest. Instead, it appears Congress ratified the existing administrative regulations applicable to all Natives. Heldina Eluska, 21 IBLA 292, 293-94 (1975) * * *.

Elsie Bergman, supra at 234, 235.

It is settled that the requirement applies to land regardless of where it is situated. Jack Gosuk, 22 IBLA 392 (1975); Louis P. Simpson, 20 IBLA 387 (1975).

[3] Appellant further contends that requiring use and occupancy prior to a withdrawal, as per the Secretarial Guideline of October 18, 1973, violates the rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970). We reject this argument.

The APA, 5 U.S.C. § 553(a)(2)(1970), expressly excepts public property from the rulemaking requirements. "Public lands are

public property, and are therefore exempt from rule making procedures. McNeil v. Seaton, 281 F.2d 981, 986 (D.C. Cir. 1960); Heirs of Dorothy Gordon, 22 IBLA 213 (1975); Arizona Public Service Co., 20 IBLA 120, 122 (1975)." Herman Joseph (On Reconsideration), 22 IBLA 266, 268 (1975). Therefore, the Secretarial Guideline did not need to be published under the rulemaking procedure.

[4] Lastly, this Board has held there is no right to a hearing concerning the rejection of a Native allotment application. Jack Gosuk, supra at 395; see Pence v. Morton, 391 F. Supp. 1021 (1975), appeal pending. Such a hearing may be granted in the Department's discretion, but such "[h]earings will not be held where it is unlikely that further evidence will result in a different conclusion." Beulah Moses, 21 IBLA 157, 158-59 (1975). There is no indication that such evidence could be produced at a hearing. Also, appellant was afforded adequate opportunity to submit further proof to support his application. Therefore, appellant's request for a hearing is denied.

This Board finds that the decision below was proper, as appellant has failed to satisfy the 5-year use and occupancy requirement in his own right, before the land was withdrawn from Native allotment settlement.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision rejecting Native allotment application AA 7461 is affirmed.

_____
Joan B. Thompson
Administrative Judge

We concur:

_____
Martin Ritvo
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge